IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No. 281/2003 Decided on 13th Sept, 2004

WITH

Criminal Appeal No. 270/2003

A.F.R. (Approved for reporting)

~~Not approved for reporting~~

Date 13th Sept, 2004 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL, AT NAINITAL

Criminal Appeal No. 281 of 2003

Surendra @ Chikna
S/o Sri Keshar Singh Bisht
R/o 270 M.D.D.A. Colony
P.S. Dalanwala
District Dehradun …….Appellant

Versus

State ……Respondent

AND

Criminal Appeal No. 270 of 2003

Umesh Dimri @ Mukesh Dimri
S/o Sri Chakradhar Dimri
R/o MDDA, 9 Deep Nagar Colony
Kaidarpuram, Ajabpur Kala
District Dehradun ……..Appellant

Versus

State ……..Respondent

Hon'ble J.C.S. Rawat, J.

Both these two criminal appeals under section 374 of the Code of Criminal Procedure have been filed against the same judgment and order dated 25.8.2003 passed by learned Sessions Judge, Dehradun in S.T. No.75/2002 State Vs. Umesh Dimri and others, whereby the Sessions Judge has convicted Umesh Dimri @ Mukesh Dimri, Surendra @ Chikna & Rakesh @ Raka and sentenced them to undergo RI for five years under section 307 read with section 34 IPC and further to pay fine of Rs. 2000/- each and in default of payment of fine all the convicts shall have to undergo further rigorous imprisonment for six months each. However, Umesh Dimri @ Mukesh Dimri, Surendra @ Chikna and Rakesh @ Raka were acquitted from the charge under section 504 IPC.

2. Brief facts of the case are that on 5.4.2002 at about 4PM Om Prakash Yadav (PW-1) – an ice cream seller was coming to his house after selling the ice cream and on the way when he reached near Shiv Mandir, M.D.D.A. Colony, Kedarpuram accused-Umesh Dimri @ Mukesh Dimri, Surendra @ Chikna and Rakesh @ Raka met him there and they stopped him. Accused persons then demanded money from him for purchasing the liquor. When he refused to give the money the

accused persons have wielded ‘Lathi-Danda’ on his head and abused him. The victim-Om Prakash sustained the injuries on his head and face. Raj Kumar (PW-4) and Banwari Lal (PW-3)-informant reached there and witnessed the occurrence. They raised alarm and tried to chase the assailants but the assailants made their escape good from there. Banwari Lal (PW-3) – informant with the assistance of another witness Raj Kumar took the victim-Om Prakash to Doon Hospital and got him medically examined at 6PM on the same day. Thereafter, the written report (Ex.ka.2) scribed by Raj Kumar (PW-4) was lodged by Banwari Lal (PW-3) at the police station Dalanwala on 5.4.2002 at 10:15PM. On the basis of written report (Ex.ka.2), the FIR (Ex.ka.5) was prepared and a case was registered. The investigation was entrusted to S.I. H. S. Negi (PW-5) who visited the place of occurrence and prepared site plan and recorded the statements of the witnesses. After completing the investigation, the chargesheet was submitted by the I.O. against the appellants and Rakesh @ Raka under section 307/34 and 504/34 IPC.

3. Charges were framed against the appellants and Rakesh @ Raka 307 read with section 34 IPC. The accused denied the charge and claimed the trial.

4. In order to prove its case, the prosecution has produced seven witnesses. Om Prakash Yadav (PW-1) was the victim of the incident. Dr. S.S. Tollia (PW-2) conducted the medical examination of the injured-Om Prakash on 5.4.2002 at about 6PM and detected the following injuries on his person:-

(i) Missing of upper inciser teeth, fresh bleeding present refer to dental surgeon.
(ii) Lacerated bond 1cm x 0.5cm on the right angle of the mouth.
(iii) Traumatic swelling 5cm x 2cm, right side head 6cm about right ear, X-ray advised.

5. Dr. S. S. Tollia advised for X-ray for injury nos. 1 & 3 and further opined that injury no.2 was simple in nature and it was possible by the

blunt weapon. He further opined that all the injuries were fresh and all the injuries could have been caused by Lathi and Dandas.

6. Banwari Lal (PW-3) was the informant of the incident. He also proved the report Ex.ka.2. Raj Kumar (PW-4) and Banwari Lal (PW-3) were the eye witnesses of the occurrence. S.I. Sri H.S. Negi (PW-5) was the investigating officer of the case. The prosecution had also produced Dr. K.K.Tamta (PW-6) who proved the medical report Ex.ka.8. He was posted at Dun Hospital as a surgeon. The prosecution also adduced the evidence of Vijay Sagar Bhardwaj (PW-7), who was the PRO in the C.T. Scan Centre, Dehradun and he also proved the C.T. Scan report (Ex.ka.9).

7. The appellants and Rakesh @ Raka in their statements recorded under section 313 Cr.P.C. denied the prosecution case and stated that they have been falsely implicated in the case. The appellants and other accused Rakesh @ Raka did not produce any defence witnesses.

8. The learned Sessions Judge on the basis of his appreciation of the evidence in the case held that the prosecution proved its case against the accused persons beyond reasonable doubt and sentenced them to undergo RI for five years under section 307 read with section 34 IPC and further to pay fine Rs. 2000/- each. The appellants denied the charges levelled against them and claimed trial.

9. I have heard Sri Sandeep Tandon learned counsel for the appellants and Sri H.S. Pandey learned A.G.A. I have also gone through the evidence and material on record.

10. At the outset, it need to be mentioned here that it is not disputed that the victim-Om Prakash Yadav Sustained injuries on the date of occurrence. Medical Officer Dr. S.S. Tollia (PW2) had also deposed that the injured was medically examined on 5.4.2002 at 6PM and found the injuries were fresh.

11. Now, I have to consider whether to prosecution witnesses are credible and trustworthy or not. Banwari Lal (PW-3) and Raj Kumar (PW-4) stated that on 5.4.2002 at about 4PM Om Prakash Yadav-victim was coming to his house after selling the ice cream and on the way when he reached near Shiv Mandir, M.D.D.A. Colony, Kedarpuram appellants-Umesh Dimri @ Mukesh Dimri @ Surendra @ Chikna and co-accused Rakesh @ Raka met him there and stopped him. Accused persons then demanded money from him for purchasing the liquor. When he refused to give the money the accused persons have wielded the 'Lathi-Danda' and abused him. The victim-Om Prakash sustained injuries on his head and face. Raj Kumar (PW-4) and Banwari Lal (PW-3) reached there and witnessed the occurrence and immediately reported the matter to the police station. I have gone through the evidence and find the testimony of the witnesses remained unshaken during the cross examination. As such the evidence of the witnesses of credible and trustworthy. The learned Sessions Judge has rightly held that the evidence of the witnesses has inspired confidence to convict the appellants as well as the accused-Rakesh @ Raka, who has not filed any appeal before the court.

12. The evidence of eye-witnesses further stand corroborated by the evidence of Dr. S.S. Tollia (PW2). Dr. S. S. Tollia (PW2) who conducted the medical examination of the injured and found that the injuries sustained by the victim were caused by Lathi and Dandas.

13. Learned counsel for the appellants did not dispute the propriety of the conviction and submitted that there was no intention to cause harm to the injured. He further submitted that the instant case does not fall within the purview of Section 307 IPC and it merely comes within the purview of Section 324 IPC. The learned Sessions Judge by convicting the appellants has held that there was fracture on the skull of the injured though there was no internal damage and further held that the nature of injuries on the person of injured-Om Prakash brings the offence of the accused persons within the ambit of Section 307 IPC.

14. The learned counsel for the appellants has submitted that the report of C.T. Scan (Ex.ka.9) is not reliable and trustworthy. He further submitted that Dr. Nair, who prepared the report, was not produced before the court to prove the said C.T. Scan report. Vijay Sagar Bhardwaj (PW7), PRO, C.T. Scan Centre was produced before the court and since he was not a technical person hence he could not prove the said report. The learned counsel contended that the said report was given by the doctor on a plain paper in which it has been clearly indicated that it was a provisional report. It does not bear any seal of the doctor concerned which may indicate who had signed on it. No subsequent report in pursuance of the provisional report was produced before the court. The identification marks of the injured were not obtained on the report. The age of the injured had been shown as 40 years whereas the hospital admission slip shows the age of the injured as about 36 years. The learned counsel for the appellants contended that the said report does not pertains to the injured. The learned A.G.A. refuted the contentions and submitted that there are certain lapses on the report and even though the said report may be read in evidence. I have gone through the evidence of Vijay Sagar Bhardwaj (PW7), who was posted as PRO in the C.T. Scan Centre, stated that Dr. G. Naiyer was posted as Radiologist in the C.T. Scan Centre and perhaps he had left for foreign country and he proved the writing of Dr. G. Naiyer. He admitted that there was no signature of the injured on the said report and he further admitted that the name of the injured has not been written in the C.T. Scan report. He admitted that the C.T. Scan was not taken in his presence and he further stated that no other report, except Ex.ka.9, has been made in the C.T. Scan Centre. Thus the prosecution has not shown any cogent reason as to why Dr. G. Naiyer was not produced before the court, however, Dr. G. Naiyer could have been summoned. It is not a definite version of Vijay Sagar Bhardwaj (PW-7) that Dr. G. Naiyer has left the country. There is no identification mark on the report. The said report was provisional and no final report has been adduced before the court. Thus, the report submitted by the C.T. Scan Centre does not inspire confidence about its credibility and this report cannot be relied upon that there was fracture on the skull of the injured. In absence of fracture on the skull of the injured, the injuries were simple. The

prosecution has adduced the evidence that the appellant fell on the ground and sustained injuries. None of the witnesses had stated that the injuries were caused by the appellant with the intention to cause death of the injured person. There is no evidence that the inciser teeth of the injured was broken by the appellants and other accused. However, the medical officer has found that the inciser teeth was missing and there was blood in it. The injured was also referred to the dental surgeon. There is no evidence on record that the injured was examined by the dental surgeon. In absence of such evidence, it cannot be held that the inciser teeth was broken during the incident.

15. The learned counsel for the appellants has submitted that there was no previous enmity between the appellants and the injured and further submitted that the injuries were made due to fall at the spot. The learned counsel for the appellants has submitted that the injured fell on the ground towards the right side of the head. He further submitted that Om Prakash (PW-1) has stated during the cross examination as follows:

> "मुझे 2–3 डन्डे ही मारे होगें कि मैं डन्डे खाकर नीचे गिर गया । चोट आने पर मैं जमीन पर सिर के बल गिरा मेरे सिर के दाहिने साईड जमीन पर लगे थे । जमीन पर गिरने के बाद मैं बेहोश हो गया था।"

Om Prakash (PW1) has further stated as follows:-

> "जहां पर मै जमीन पर गिरा था वह कच्ची जगह थी । इस जगह जमीन पर पत्थर पडे हुए थे । मंदिर में हर समय पुजारी नहीं रहता है । वहां पुजारी सुबह के समय या शाम के समय पूजा के लिये रहता है । मैं नहीं बता सकता कि उस मन्दिर में दिन भर व्यक्ति दर्शन को आते है अथवा नहीं है ।"

16. It has been held by the Apex Court in **Kundan Singh Vs. State of Punjab 1982 SCC (Cri) p/700(I):-**

> *"We are of the view that having regard to the facts and circumstances of the present case and particularly in view of the fact that PW6 and PW7 were in the courtyard of their house when the appellant fired gunshots and he could not, therefore, have*

intended to injure them, the conviction of the appellant under section 307 IPC was not justified. We think that the conviction of the appellant could be maintained only under section 324 of the Indian Penal Code since PW6 and PW7 received simple injuries. We accordingly allow the appeal and alter the conviction of the appellant to one under section 324 of the Indian Penal Code for causing simple injuries to PW6 and PW7 and since the appellant has already suffered imprisonment for about 16 months, we direct that the sentence imposed on the appellant be reduced to that already, undergone by him and he may be set at liberty forthwith."

17. It has also been held in **Jarnail Singh Vs. State of Punjab 1982 SCC (Cri) p/701:-**

"We are of the view that having regard to the circumstances in which the offence took place it is not possible to convict the appellant Jarnail Singh of the offence under section 302 read with section 34 IPC since there was no preconcert between Sarwan Singh and the appellant nor a meeting of minds between them before the offence took place. We, therefore, set aside the conviction of the appellant under section 302 read with section 34 IPC, and since he merely gave a takwa blow on the ear and caused simple injuries, we alter his conviction to one under section 324 IPC. We are told that the appellant has already been in jail about two and a half years and we, therefore, reduce the sentence imposed upon him to that already undergone by him and direct that he may be set at liberty forthwith."

18. It has been held in **Ramu Vs. State of U.P. 2004(1) J.Cr.C. p/527 :-**

"3. Having examined the evidence on record we are in agreement with the High Court that the appellant did not have any motive whatsoever to cause any fatal injury to the deceased. We also agree with the High Court that the injury in question was caused during a melee in which 6 persons took part therefore in our opinion on the facts and circumstances of this case, the act of the appellant in causing injury to the deceased which led to his

death, cannot be the one which could be construed even as an act of culpable homicide not amounting to murder. Therefore, to that extent in our opinion the High Court fell in error in holding the appellant guilty for an offence under section 304 IPC. In our considered opinion on the facts and circumstances of this case the act of the appellant is one of casing grievous hurt with a deadly weapon which is punishable under section 326 IPC. Noticing the fact that the incident in question has occurred as far back as 1978 and the appellant had not enmity against the deceased nor any motive to cause a fatal injury, we think the ends of justice would be met if the appellant's conviction is altered to one under section 326 IPC and a sentence of 3 years' RI is awarded for the said offence."

19. In the instant case, there is no oral evidence that the appellants inflicted the injuries on the person of the injured with the intention and knowledge to commit the murder which is punishable under section 307 IPC. The medical report also reveals that the injuries were simple in nature. Having regards to the circumstances of the case the act of the appellants and other accused is one of causing a simple hurt by Lathi and Danda. There was no previous enmity between the parties. Considering oral evidence of the eye witnesses and the nature of the injuries, the case does not fall within the ambit of section 307 IPC. It merely falls within the ambit of section 324 IPC. Therefore, the learned Sessions Judge has erred in holding that the appellants and other accused were guilty under section 307 IPC. Thus, the order dated 25.8.2003 passed by Sessions Judge, Dehradun deserves to be modified accordingly.

20. Three accused persons namely Umesh Dimri @ Mukesh Dimri, Surendra @ Chikna and Rakesh @ Raka were convicted under section 307 read with section 34 IPC by the learned Sessions Judge. However, the appellants-Umesh Dimri @ Mukesh Dimri and Surendra @ Chikna have preferred the appeals before this court against the conviction and sentence awarded as above but the other accused-Rakesh @ Raka who was also convicted under section 307 IPC has not filed any appeal. Now, the question arises as to whether the benefit of the present finding

should be extended to the co-accused Rakesh @ Raka or not. It has been held in **Bijoy Singh and another Vs. State of Bihar 2003 SCC (Cri) p/1093:-**

> *"12. Awadhesh Singh (A-11) who was also convicted with the aid of section 149 IPC has not filed an appeal in this Court. In view of the judgments of this Court in* ***Raja Ram Vs. State of M.P. {See 1994 (2) SCC p/568, 1994 SCC (Cri) p/573}, Dandu Lakshmi Reddy Vs. State of A.P. {See 1999 (7) SCC p/69, 1999 SCC (Cri) p/1176} and Anil Rai Vs. State of Bihar {See 2001 (7) SCC p/318, 2001 SCC (Cri) p/1009, J.T. 2001 (6) SC p/.515}*** *he is also entitled to the benefit of this judgment. This Court has set up a judicial precedent that where on evaluation of the case if the court reaches the conclusion that no conviction of any accused is possible, the benefit of that decision must be extended to the co-accused, similarly situated, though he has not challenged the order by way of an appeal."*

21. In view of the discussion, the benefit of the finding must be extended to the co-accused Rakesh @ Raka, similarly situated, though he has not challenged the order by way of an appeal.

2. For the aforesaid reasons, both the appeals are partly allowed, I, therefore, alter the conviction of the appellants from one section 307 read with section 34 IPC to that under section 324/34 IPC and reduce the sentence from five years RI to two years RI and a fine of Rs.1000/- (Rupees one thousand only) each. In default of fine, all the convicts shall have to undergo further RI for two months. Other accused-Rakesh @ Raka who has not filed any appeal before this court shall get the benefit of the said finding and his sentence is also altered accordingly.

(J. C. S. Rawat, J.)

Dated: 13th September, 2004

Rawat